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IN THE

Supreme Court of the United States

October Term, 1941

No. 1157.

ROBERT A. HELTON, Administrator of the Estate of Walter J. Probert, Deceased,

Petitioner,

vs.

CHARLES M. THOMSON, Trustee of Chicago and North Western Railway Company (Substituted for Charles P. Megan, Trustee, and Chicago and North Western Railway Company),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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MCCORMICK AND HENDERSON, INC., CHICAGO

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INACCURACIES AND OMISSIONS.

The statement of the case by the court below (Rec. 173-180) is more accurate, reliable and complete than that of petitioner. In the latter the following, among other inaccuracies and omissions appear:

1. At top of p. 5 the petition states that the so-called "passing track" was "not always" used for holding one

train for the passage of another. The record shows it was hardly ever used as a passing track, but mostly, if not entirely, for various other purposes (Rec. 79, 80, 122, 123). This is important in connection with the testimony of Helton, the plaintiff, later referred to, that practically all of his testimony was based upon the assumption that it was used *exclusively* as a passing track.

2. In the second paragraph of p. 5 the petition says that "two ordinary railroad ties were laid across the rails of this track at its north end." Although of no particular importance, the evidence is that the inside ends of the two ties were sunk in the ground between the permanent ties of the roadbed, to anchor them in place (Rec. 115, 116, 119, 121, 123-5).

3. The third paragraph of p. 5 of the petition omits practically all of the important part of what took place at the time therein referred to, namely: after receipt of the train dispatcher's written order to set out the part of the train then and there present, Probert read the order aloud to the two enginemen, then handed it to the engineer, to whom it was addressed, who read it aloud to the fireman and Probert; then the engineer and Probert, in the presence of the fireman, discussed the operations necessary to carry out the order (Rec. 137), and the engineer advised Probert that he would pull south, and ordered Probert to get off the engine as it passed the pot or dwarf signal, at the south end of the interlocking plant, and to stay there until the rear car cleared that signal, and then to signal for the train to stop, and then when that electrically operated dwarf or pot signal gave the indication that it was lined up for the passing track, to signal the enginemen to back up (Rec. 138). The train then moved south and Probert dropped off the engine at the pot signal (Rec. 138). But in disobedience of the written order of the dispatcher and

the spoken order of the engineer, he did not stay there, but proceeded south, in the direction of the movment of the train, to the housetrack switch, about 400 feet south of the pot signal, where he then gave the signal to stop, bringing the train to a stop with its rear car south of that housetrack switch. The enginemen were then between a quarter and a third of a mile (being the full-length of the train) away from him (Rec. 87) and they of course assumed that when he gave the stop signal he was at the pot signal, where he had been ordered to be and should have been. Here please note the inconsistent and wholly inaccurate statement, in this paragraph 5 of the petition, that "Probert waited on the ground while the train proceeded southward a sufficient distance to back into the passing track. *While in this position* [at the pot signal] and when the last car on the train was south of the points of the housetrack switch, Probert stopped the train by signalling the engineer." This was not possible, for the housetrack switch was 400 feet from the pot signal, it was black dark (Rec. 47, 114) and there was no light on the housetrack switch (Rec. 143-4). When he gave that stop signal he was at the housetrack switch.

4. Having made that impossible statement, the petition then proceeds to say, in the last paragraph on p. 5, that Probert then, "*at this point*," discovered that the "bad order" car was in the train. This is another impossibility, for the so-called "bad order" of that rear car consisted only of its having been cut off from the train line brakes, which fact Probert could not have "discovered" until after he had left his post, gone to the housetrack switch and from there had given the stop signal and the engineer had applied the brakes. He might then have noticed that the brakes did not apply on that car, but that would not be apparent until after that rear car had passed the housetract switch and he had given the stop signal. It is obvious

that before he *could* "discover" that the brakes on that car had been cut off he had left the pot signal and gone to the housetrack switch; that before he could have made any such "discovery" he had decided to and had proceeded to disobey his orders and back the train onto the housetrack.

5. In the petition, p. 7, paragraph numbered 5, there is a misstatement which has appeared in other briefs of plaintiff in the state courts, namely, that in the absence of the conductor and rear brakeman Probert was in charge of the train. On his redirect examination Helton, plaintiff, had (inadvertently, perhaps) said something of the kind, in response to a leading question, but on his later re-cross examination he emphatically repudiated any intention to so testify, and repeatedly stated that in the absence of the conductor the engineer was in charge of the train, and that train orders would be directed to him only, "and he would be the fellow, absolutely, who would direct the movement, and the head brakeman wouldn't have any authority over him at all, or have any such authority as the conductor has when he is present" (Rec. 37).

This same misstatement appears elsewhere in the petition. See pp. 11 (bottom), 12 (middle), 17 (bottom). There would see to be no excuse for making it. Its obvious purpose is to mislead to the belief that Probert had the right to "set out" the "bad order" car, just as the conductor was doing at Waukegan, when he was interrupted by Probert's false report to the engineer and fireman that he had received a signal to pull out of town, which was the cause of the leaving of part of the train, and the conductor and rear brakeman, at that place. But there was no similarity in the situations, as fully explained by Train Dispatcher Shavel, on cross examination, Rec. 112.

6. Petition, p. 7, paragraph 8, p. 8, par. 2. It is inaccurate to say that the decision of the court below deprives

the petitioner "and the widow and minor son of Probert" of their right to trial by jury.

7. Commencing with the last caption on p. 10 the petition makes many inaccurate statements, among them the following:

(a) Paragraph commencing at bottom of p. 10. That it would take much more work, time and trouble to put the "bad order" car on the passing track, and much more labor, expense and trouble to later take it out and repair it. This is contrary to the testimony of the witnesses, including Helton, the plaintiff (Rec. (Helton) 26, 41; defendant's witnesses: Rec. 71, 80, 86, 87, 104, 111, 129, 130). It would not be necessary to "take it to the shop or to a repair track to repair it." It could be repaired right there on the passing track (Rec. 80).

(b) First full paragraph, p. 11. Although Helton testified as stated it was not in connection with the facts and circumstances of this case. Parenthetically, Helton should not have been allowed to testify to any matters of defendant's operating practices. The trial court's theory was that because he said that he was a train dispatcher for another railroad he was an expert (Rec. 11, 13) as to all dispatching and operating practices on defendant's railroad, although he further testified that he never was a dispatcher on any other road than the Milwaukee, never worked as a trainman, and was not familiar with practices on defendant's railroad, either operating or dispatching (Rec. 19-20). Furthermore, Probert had no right of selection as between the two tracks, and had no authority or duty to "set out" the "bad order" car.

(c) Petition, p. 11, second paragraph. As last above indicated, Probert had no authority or duty to choose between the two tracks. The statement that putting the 34

cars on the passing track, as ordered by the dispatcher and the engineer, "would have produced confusion" is not only "inaccurate," but is contrary to the undisputed facts (Rec. Helton, 23-4, 27, 28, 30, 31, 32; defendant's witnesses, 68, 69, 71, 74, 80, 84-5, 86-8, 93, 97, 101, 102-3, 104, 110-112, 128, 129-30).

(d) Petition, p. 11, third paragraph. Authority for this statement is found commencing at the bottom of p. 35 of the Record. But standing alone it is misleading. Helton also testified to the exact contrary (Rec. 23, bottom; 24, top; 26, bottom; 27, top and bottom). And he entirely repudiated the statement as applied to this case, testifying that his answers were "absolutely based on the fact that this track is called a passing track * * * is used exclusively for passing track, and my answers would be different if I knew it was used for other purposes" (Rec. 40, lower half). It is uncontradicted that although the track is *called* a passing track it is in fact a "stub" track rarely used as a passing track, its constant and common use being storage of cars, setting out bad order cars, housing bunk cars of extra gang laborers, etc. (Rec. 79, 80, 122-3). Furthermore that track and its switch were part of the interlocking plant, the switch being electrically operated by the towerman. See also Helton's testimony, Record, last fourth of p. 27 and top third of p. 28.

(e) Petition, p. 11, fourth paragraph. This is a morsel selected from the deposition of the conductor and is without any bearing on or connection with the issues in this case. It was followed (Rec. 46) by his statement that "If we have a specific order to place a car or string of cars we follow the order." And it is to be noted that the quotation in the petition omits part of what the witness said, namely, that "where switch engines are employed" (Rec. 46, top half).

(f) Petition, p. 11, last paragraph. There are three misleading inaccuracies in the paragraph: On the page of the Record (28) referred to the witness (Helton) testified that, in the absence of instructions, the brakeman, upon discovery of a bad order car in his train would set it out, and that obeying the dispatcher's and engineer's orders in this case would have resulted in setting out this bad order car (Rec. 30); "Where the conductor and rear brakeman were left behind it would be the duty of the head brakeman (Probert) to take charge," etc. This is not so, as Helton very emphatically stated (Rec. 37); that the engineer "would be the fellow, absolutely, who would direct the movement (Rec. 37); and Helton also testified (Rec. 30) that the putting of the train on the passing track, as ordered by the dispatcher and the engineer would have accomplished the same result as "setting out" the 34th car on the housetrack (Rec. 23), but more safely (Rec. 21), more expeditiously (Rec. 23), and that in ordering this train onto the passing track the dispatcher exercised good judgment (Rec. 31, bottom, 32, top).

(g) Petition, p. 12, second paragraph. Here is repeated the testimony of the conductor upon which we commented in our paragraph (e), supra.

(h) Petition, p. 12, third paragraph. This is a rehash of the inaccuracies we have commented upon in foregoing paragraphs.

(i) Petition, p. 13, second paragraph. The witness Larson, his attention being called to the facts of this case, very definitely qualified the testimony referred to in the petition, saying that a trainman would have no right to choose a track if, as here, he had had instructions from the dispatcher to "put the train on a particular one" (Rec. 74).

(j) Petition, p. 13, fourth paragraph. This is a rather amazing "inaccuracy." We do not deny that in certain

circumstances it might have been proper to "set out" the "bad order" car on the housetrack, but nobody testified that it would have been proper for Probert to set it out on that track in the circumstances that existed at the time in question. Even Helton testified that there was no excuse for what Probert seems to have been trying to do unless he had first discovered that the rear car was bad order (that the brakes were not setting on it), admitting that as to that he was "speculating" when stating a preference for the housetrack over the passing track, and that of course he didn't know what the facts were at all (Rec. 32). He also testified that the car was not dangerous to haul (21), that it would be "absolutely a good deal safer to use the passing track" (21), that trainmen must not use their own judgment when they have had orders from a dispatcher, but that if they think the orders improper they must get in touch with the dispatcher (22); that train dispatchers' orders "are to be explicitly obeyed in all circumstances if it is possible to do so," as it was here (23). He also testified that all of his testimony attempting to justify Probert's disobedience was based upon his assumption that because the track ordered to be used was *called* a passing track it was used *exclusively* as such, *i.e.*, for trains to go in and allow other trains to pass; that his testimony would be different if it were called a storage track (which, among other things, it was), or if it were called a stub-end switch track (which, among other things, it was); that his answers were "absolutely based on the fact that [because] this track is *called* a passing track, * * * that it is used exclusively for passing track, and my answers would be different if I knew it was used for other purposes" (Rec. 40). As before pointed out, the track was scarcely ever used as a passing track, its main uses being that of a storage track, as a stub-end switch track,

for setting out bad order cars, etc. (Rec. 79-80, 122-123, 127). Several witnesses testified that, in the circumstances of this case "it would be *improper* to set out the bad order car on the housetrack" (Rec. 63, 64-74, 82-4, 85-7, 92-3, 99-100, 100-01, 102, 103-4, 107, 110-12, 128, 129, 130).

(k) Petition, p. 13, bottom, 14, top. This is both inaccurate and frivolous. Nobody knows what Probert had in mind, or whether or not he "was attempting to put 34 cars on a track that would only hold 10 or 12." Whatever it was that he had in mind, the fact is that, on his own motion, and in flagrant disobedience of the orders of the train dispatcher and the engineer, he left his post at the pot signal, went to and unlocked and threw the housetrack switch, and then signaled the enginemen to back the train into that track. There is nothing in the opinion of the court below indicating anything else.

There are other inaccuracies on pages 14 and 15 of the petition, the next of importance beginning at the bottom of p. 15. It consists of saying that the record shows that after Probert left the engine "with the intention of guiding the train into the passing track, in accordance with the message of the train dispatcher" he "then discovered the serious, bad condition of this car." The statement is contrary to the evidence. After the order of the dispatcher was received and read by Probert and the enginemen, the engineer, to whom it was addressed, and who was then, in the absence of the conductor, in charge of the train (Helton, Rec. 37) ordered Probert to alight from the engine as it passed the pot signal, and when the rear car cleared the pot signal to give the enginemen a stop signal. If Probert had stayed at the pot signal, as ordered to do, it would have been physically impossible for him to "discover" the condition of the rear car, which was neither serious nor bad. Its condition simply was that it was cut

off from the trainline brakes, and was in no way dangerous to anybody or to the train while it was the rear car of the string (Helton, Rec. 21, 41). There would be no indication of its condition while the train was moving, but a person on the ground, by careful observation, might discover it when the brakes were applied by the engineer, by noting that the brake-shoes did not press against the wheels as the train was brought to a stop. There was, at the time in question, but a single movement of the train, namely, south, to clear the pot signal (Rec. 141, bottom, cross examination of engineer Olson). When that movement started the rear car was the whole length of the train north of the pot signal. If Probert had been at the pot signal the rear car would have passed him without any indication whatever that there was anything wrong with it. Indubitably, he was not at the pot signal when the rear car passed it, for he didn't give his signal to stop that movement until the rear car had cleared the housetrack switch, over 400 feet south of the pot signal (Rec. 141-2). It follows that he had determined upon the strange course he took before he *could* have discovered that the brakes on the rear car had been cut out of the air line.

(1) Petition, p. 16, last paragraph. The witness Glasscock did not in any sense admit that Probert was justified in what he did. The petition's Record reference is to pp. 93-5, a reading of which demonstrates the "inaccuracy" of the petition. Incidentally, he was asked an improper question (Rec. 93, lower half of page) and our objections to it (Rec. 94) should have been sustained. The question contained two irrelevant assumptions, namely, (1) that the hypothetical trainmen discovered something wrong with some part of their train where it would be absolutely necessary to get that part of the train or the whole train in the clear, and (2) when they would have no way of com-

municating with the dispatcher. And see the trial judge's interpretation of the question as intending to assume "an emergency" (Rec. 94). Every witness who testified on the subject, including Glasscock (Rec. 92, bottom, 93, top, down to middle) and Helton (Rec. 21, bottom half, 22, bottom half, 23, top quarter and bottom half, 26, two bottom lines, and 27, three top lines, 27, bottom one-third, 28, bottom one-fourth, 30, lower half, 31, last five lines and 32, first three lines, 32, just below middle) stated that in the circumstances shown in the record in this case the condition of the rear car created no necessity whatever to get any part or the whole of this train "in the clear," did not create any emergency, and it is wholly undisputed that right there at hand, in the interlocking plant, was the dispatcher's telephone, affording exclusive and convenient communication with the dispatcher (Rec. 71, bottom, 72, top, 79, top, 85, last three lines, and 86, first four lines, 89, bottom third, 102, 107, bottom four lines).

(m) Petition, p. 17, second paragraph. Rule 964 would not have been violated if Probert had obeyed his orders. Reading it, as it is quoted in the petition, demonstrates this. Those orders were not that he put the rear car on the so-called passing track and leave it there, but to temporarily put the 34 cars there. The purpose being to get the whole train together again and in charge of the conductor. This "inaccuracy" is a quibble.

(n) Petition, p. 17, last paragraph. It seems to us to be more than merely inaccurate to say that Probert "had no means of communicating with any dispatcher." And it is almost as bad to say that he could not communicate with the engineer except by signals. There was no "dangerous car" in the train. Because even Helton testified to the contrary (Rec. 21), the repetition in the petition of this "dangerous car" inaccuracy might reasonably call

for stronger language than we wish to use. If that rear car *was* dangerous, it was just as much so in connection with backing it into the housetrack as it would have been in backing it into the passing track. Furthermore, Probert had no duty to "set it out." That would have been up to the conductor after the engine had gone to Waukegan and brought him and the marooned eight cars down to Lake Bluff, where he then would reassume charge of the whole train and its crew. It must be assumed that if then *he* decided or was ordered by the dispatcher to leave the rear car on the passing track he would do so in accordance with defendant's rules, but that would be strictly his business, not Probert's.

(o) Petition, p. 18, second paragraph under the boldface type. The witness Christensen, the fireman, did not mean that Probert gave his slow signals all the way after the train had entered the housetrack. He said that the next signal he got after the train started backing up, presumably into the passing track, was a slow signal, after which that signal was repeated all the way in. At this point in his testimony he did not say how far the train had moved before he got the first slow signal, and it is of no importance or significance anyway. He testified that the slow signal meant that the man giving it wanted the speed retarded to some extent, that he at once relayed each signal to the engineer, who acted upon it at once. Furthermore, as a part of his case, plaintiff introduced in evidence the deposition of this witness, Christensen (Rec. 58-62), in which he testified that he should judge that before getting the slow signal the backup movement had progressed for about five or six car lengths. There is no dispute that a car length is something over 40 feet, so that movement preceding the first slow signal had continued into the housetrack for about 250 feet (Rec. 60); that after that

the engineer backed up easy; he cut down on the speed (Rec. 60). The engineer, Olson, testified to that distance as being "maybe eight or nine car lengths, seven car lengths, something like that" (Rec. 139, just below middle).

Petition, p. 19, first paragraph. This paragraph is composed of inaccuracies. The quotation as to what the slow signal should have meant to the enginemen is not to be found in the record, and is obviously inconsistent with other statements in the petition to the effect that Probert commenced giving slow signals at once after the backward movement started. If the slow signal meant, as the petition says, that the enginemen should expect a stop signal "any second now," if he kept repeating it over a distance of 400 feet, it was like the "wolf, wolf" cry of the well-known fable. However, as already pointed out, the movement had progressed for from five to nine car lengths before the first slow signal was given (Rec. 139), and the slow signals were promptly interpreted and acted upon by the enginemen. In this connection it should be remembered that the enginemen knew that the passing track was clear (empty) (Rec. 61, 62), that it held 50 to 60 cars, and that they had no reason to suspect that Probert was taking them into the little housetrack. Neither is there any authority in the record for the second sentence in this paragraph of the petition. The engine did not run on for two car lengths before coming "to the end of the track," plus 75 feet "beyond the end of the track." It is true that in his deposition the fireman said that "when we got the stop signal we could not have been over two cars at the most from the end" (Rec. 60), which was a mere conclusion as to a maximum and in no way weakens his or the engineer's testimony that all of Probert's signals were promptly relayed and promptly acted upon (Rec. 60, 139, 147, bottom, 148-9). The evidence is that the final signal—

a violent stop signal, or emergency, or "wash-out" signal—was relayed and acted upon at once, the full or emergency braking power applied, and almost at once the rear end of the train hit the bumper at the end of the track and moved but 75 feet (Rec. 116, middle) before coming to a rest. The towerman, Arquilla, who saw the "wash-out" signal given, testified that when given "the rear car was then right at the end of the housetrack" (Rec. 151, bottom half).

ARGUMENT.

The petition, as hereinbefore indicated, bases its prayer upon omissions, inaccuracies and misleading statements. The opinion of the court below is correct and was passed upon and in effect approved by the Supreme Court of Illinois in denying leave to appeal. *Soden* v. *Claney*, 269 Ill. 98, 102. There is no substantial reason why it should be reviewed by this court. It contains one inaccurate statement of fact, probably inadvertent or clerical. About one-third of the way down on p. 178 of the Record, in discussing the signals given by Probert while the train was on the housetrack, it says that the next signal after the slow signals "was a stop signal, *then* a fast stop signal, *and finally* an emergency signal (what they call a 'wash-out,' which means stop at once)." The fact is that after the slow signals had been given and acted upon, there was but *one* stop signal given, it being the so-called "wash-out" signal (Rec. 139, 147).

There seems to us to be no merit in petitioner's "Argument," pp. 20-24 of his petition. He avoids discussion of the ruling cases, and seems not to get the point of those he cites—for instance, there is no recognizable similarity in the case at bar with *Stewart* v. *Southern Ry. Co.*, 62 Sup. Ct. 616. The admirable language the petitioner quotes from the dissenting opinion in that case cannot be criticized, but it has no bearing here. This is so obvious as to need no comment. The *Seago* case, 62 Sup. Ct. 806, came to this court with a conflict in the evidence as to whether a certain hand-lantern signal had been given, and this court, as to that, said "that there was sufficient evidence of negligence for submission to the jury." In the case at bar there is no conflict in the evidence as to any material fact. The petitioner makes much of language he

quotes from the opinion of the court below (petition, p. 18), but indicates an implication not intended by the court. The language (Rec. 180, bottom) was used in connection with the statement that "The administrator and his counsel *argue*" that the enginemen "were negligent in not slowing the train down more when Probert gave the slow signal * * * and in not stopping the train immediately when the 'wash-out' or emergency signal was given immediately preceding the accident" (Rec. 180, bottom). Then occurs the language stressed by petitioner: "While there may be some *dispute* as to the facts on this phase of the case," etc. In other words "dispute" or "argument" between or by counsel. However, there is no evidence or inference from evidence that the enginemen were negligent in the respect claimed. Theirs is the only testimony on the subject and there is nothing in or about it that makes it questionable. As above pointed out, they acted promptly and at once on each of Probert's signals, and there is no evidence to the contrary. The mere fact that the rear car ran 75 feet after the brakes were applied is not proof that the train could have been stopped in any shorter distance. Even if it ran 155 feet, as now argued by petitioner, yet it cannot be said that a jury could reasonably infer that, contrary to the testimony of the enginemen, the signals were not properly acted upon or that this 34-car freight train, being pushed by a heavy road locomotive, could have been stopped, if moving at all—at any imaginable rate of speed—in a shorter distance than it was stopped. And the testimony of the eyewitness, Arquilla, the towerman, that the rear of the train was right at the end of the track when the "wash-out" signal was given, is uncontradicted and stands proved. Petitioner's argument on this is quite the same as was made by plaintiff in *Brennan* v. *B. & O. R. Co.*, 115 Fed. (2d) 555, 557

(Nov. 1940), except that in that case the argument was bolstered by the testimony of a witness who testified that the derailed cars could have been stopped in a shorter distance than they were. The court gave the argument careful consideration and discussed it (p. 557, paragraph [2-4]) but held that the contradiction with which it dealt was not substantial and did not present a jury question.

Jenkins v. *Kurns*, 313 U. S. 256, is widely different as to facts (the engineer having failed to act at all upon the hollered warning of plaintiff). The lower court held that plaintiff had failed to prove what Justice Murphy called "the engineer's subjective comprehension and correct interpretation" of the warning, "the subjective reactions in the engineer's mind." There is nothing of that kind in this case.

Baltimore & Ohio Railroad Co. v. *Wilson*, 242 U. S. 295, is far afield. On facts like those in the case at bar this court, in an opinion by Justice Holmes, upheld our every contention here.

The opinion in the case of *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, is not at variance with the long line of decisions in cases like the one at bar, as is pointed out by its writer, p. 278.

Before proceeding further we again call attention to the fact that petitioner's case always has depended solely upon the testimony of Helton, administrator, the plaintiff. Most of his testimony was inadmissible, but we do not here labor that point. Although his testimony was permeated with self-contradictions and admissions of incompetence, he conceded that he was relying basically upon first, pure speculation as to the facts (Rec. 32), and second, upon the assumption (proved to be false) that the so-called passing track was used exclusively as a passing track (Rec. 40, bottom half).

Even should we concede (which we do not) that petitioner's two contentions as to the facts are sound, yet the respondent would not be legally liable for the death of petitioner's intestate. (1) If, after he had received his orders, he had discovered that the brakes on the rear car had been cut off from the train line, and (2) that it thereupon became his duty to "set out" that car, his conduct still was the sole, the efficient, the primary cause of his death. This, because, in "crass disobedience" of his orders, without communicating with his then superior, the engineer, or with the easily reached dispatcher, he proceeded to pilot this train, without rhyme or reason, into the little housetrack instead of into the adequate and safe passing track. Any "duty" to "set out" the rear car certainly did not either require or excuse such conduct. What he did was grossly negligent and was the sole proximate cause of his death.

The claim of negligence of the enginemen is without support in the record. In the "Conclusion" of the petition (pp. 25-27) petitioner says that the engineer "apparently assumed that he was backing a 34-car train onto the passing track," and "but the engineer believing that he had to travel a total distance of more than 34 car lengths," etc. But he then arrives at a false conclusion, saying that because of that assumption and that belief the engineer "disregarded the slow signals." The evidence is against that conclusion, and is uncontradicted. But even if it were true that the conclusion is correct—even conceding that the engineer disregarded the slow signals—yet his negligence (if it were negligence) in that respect is not actionable under the ages-old rule of law, established by this court in *Milwaukee, etc.* v. *Kellogg*, 94 U. S. 469, and ever since adhered to, that in order to warrant a finding that negligence is the proximate cause of an injury it must ap-

pear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

The "Conclusion" part of the petition (pp. 25-27) repeats several of the inaccuracies already referred to and should be read in the light of those references. Some of the inaccuracies are worded somewhat differently than elsewhere in the petition. The last paragraph, beginning at the bottom of p. 26, has no foundation in the evidence, and its last sentence, if deliberately made, condemns the whole petition.

THE RULING CASES.

For many years it has been the settled law that under the Federal Employers' Liability Act there can be no recovery for death or injury caused by or occurring while the employee was engaged in disobedience of an unrevoked or superseded order, even though other employees had failed to do all they might have done to prevent the death or injury.

Great Northern Ry. Co. v. *Wiles,* 240 U. S. 444, 448;
Southern Ry. Co. v. *Gray,* 241 U. S. 333;
Frese, Admx. v. *C. B. & Q. R. R. Co.,* 263 U. S. 1, 3;
Davis v. *Kennedy,* 266 U. S. 147-9;
Unadilla Ry. Co. v. *Caldine,* 278 U. S. 139, 142;
Atlantic Coast Line v. *Davis,* 279 U. S. 34, 39;
A. C. L. R. Co. v. *Driggers,* 279 U. S. 787, 791-2;
Pheasant v. *Director General,* 285 U. S. 342, 345;
St. Louis & S. W. Ry. Co. v. *Simpson,* 286 U. S. 346;
Southern Ry. Co. v. *Dantzler,* 286 U. S. 318.

Those cases made the law. It is the law. Those decisions have been followed by the Circuit Courts of Appeals in many cases, some of them being:

Unadilla Valley Ry. Co. v. *Dibble,* 31 Fed. (2d) 239;
Bradley v. *N. W. P. R. Co.,* 44 Fed. (2d) 683, 685;
Pere Marquette Ry. Co. v. *Haskins,* 62 Fed. (2d) 806;
Van Derveer v. *D. L. & W. R. Co.,* 84 Fed. (2d) 393, 395;
Sheehan v. *N. Y., N. H. & H. R. Co.,* 93 Fed. (2d) 442, 444.

As heretofore stated, the decision of this court in the *Rocco* case, 288 U. S. 275, 278, in no way changes or was intended to change the law. Itself distinguishes that case from them. As pointed out by Judge Hahn, in *Hylton* v. *Southern Ry. Co.,* 87 Fed. (2d) 393, in the *Rocco* case the order violated did not require that the employee wait where he was, but allowed him to proceed on his way after obeying the order.

"A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act." Justice Holmes in *Unadilla* v. *Caldine,* 278 U. S. 139, 142. "Beyond peradventure respondent's intestate disobeyed a definite order which was not revoked or superseded by any other orders, verbal or written. * * * This crass disobedience of operating orders was the sole cause of the intestate's death." Justice Roberts, in *Southern Ry. Co.* v. *Youngblood, Admx.,* 286 U. S. 313, 316. "It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation

to the movement had done more." Justice Holmes, in *Davis* v. *Kennedy*, 266 U. S. 147, 148-9. "There is an absence of the essential factors that wake into life the doctrine of the last clear chance. * * * Negligent he [the conductor who, it was claimed, might have prevented the consequences of plaintiff's disobedience] may have been, but not recklessly indifferent to a duty to counteract a peril *perceived and understood.* * * * The negligence of the engineer [plaintiff] was a continuing one. * * *" Justice Cardozo in *St. Louis S. W. Ry.* v. *Simpson*, 286 U. S. 346, 350-1.

We think it clear that the case at bar is squarely within the rule of those decisions, and that there is nothing to be gained by its review. There are here no special or important reasons for review by this court. The judgment of the court below is in accord with the applicable decisions of this court.

Respectfully submitted,

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